LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 12 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Petition 1

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 3

Statement of the Case 4

Argument 13

I. There is a direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and decisions of the United States Court of Appeals for the Sixth Circuit as to the validity of the demurrage limitation provision of petitioner's tariff 13

II. The decision of the Court of Appeals in this case admittedly extends the scope of decisions of this court beyond their intended and prescribed limits 14

III. The decision of the Court of Appeals in this case decides a question of maritime law in conflict with existing decisions of this court and other courts of appeals in the field of maritime law and other fields of transportation and communication 17

IV. The decision of the Court of Appeals in this case, as well as the decision of the District Court, failed to consider and apply the well established rules of maritime law as to lookout and the obligations which they placed upon respondent's steamship in the cooperative and joint venture undertaken by and between the steamship and petitioner's tug 22

Conclusion 26

Appendix 27

TABLE OF CASES CITED.

Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1912) 18

Afran Transport Company v. M/T Bergechief, 2nd Cir. 1960, 274 F. (2d) 469 25

American Steamship Co. v. Great Lakes Towing Co., N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156 23

American Steamship Co. v. Great Lakes Towing Co. and City of East Chicago, Indiana, N. D. Ind. 1960, 1961 A. M. C. 391 23

Bisso v. Inland Waterways Corp., 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955) 14, 15, 16, 20, 21

Boston Metals Co. v. The S/S Winding Gulf, 349 U. S. 122, 75 S. Ct. 649, 99 L. Ed. 933 (1955) 15

Canada Steamship Lines, Ltd. v. Great Lakes Towing Company, N. D. Ohio 1932, 1932 A. M. C. 563 23

Circle Line Sightseeing Yachts, Inc. v. The City of New York, 2nd Cir. 1960, 283 F. (2d) 811 25

Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963) 14, 15, 16

Farrell Lines v. S. S. Birkenstein, et al., S. D. N. Y. 1962, 207 F. Supp. 500 22-23

George N. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915) 19

Great Lakes Towing Co. v. Bethlehem Transp. Corp., 6th Cir. 1933, 65 F. (2d) 543 14

Hand & Johnson Tug Boat Line v. Canada S. S. Lines, 6th Cir. 1922, 281 Fed. 779 14

Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717 (1884) 17

Lichten v. Eastern Airlines, Inc., 2nd Cir. 1951, 189 F. (2d) 939 19

Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788 (1889) 18

Midland S. S. Line, Inc. v. Tug Arkansas, 6th Cir. 1956, 232 F. (2d) 81 19

Nassau Barge Corp. v. The Fred B. Dalzell, 2nd Cir. 1950, 180 F. (2d) 560 22

Petition of Isbrandtsen Company, 2nd Cir. 1953, 201 F. (2d) 281 18

Reiss S. S. Co. v. Great Lakes Towing Co., 8th Cir. 1949, 177 F. (2d) 681, affirming, D. C. Minn. 1948, 79 F. Supp. 1 23

Smith v. The Ferncliff, 306 U. S. 444, 59 S. Ct. 615, 83 L. Ed. 862 (1939) 18

Southwestern Sugar & Molasses Co. v. River Term. Corp., 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. (2d) 1334 (1959) 15, 19

The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016 (1935) .. 18

The Coleraine, E. D. N. Y. 1910, 179 Fed. 977 23

The Pennsylvania v. Troop, 86 U. S. (19 Wall.) 125, 22 L. Ed. 148 (1874) 25

The Senator D. C. Chase, 2nd Cir. 1901, 108 Fed. 110.. 22

The Syracuse, 79 U. S. (12 Wall.) 167, 20 L. Ed. 382 (1871) 14

The Vale Royal, D. C. Md. 1943, 51 F. Supp. 412 23

The Virginia Ehrman v. Curtis, 97 U. S. 309, 24 L. Ed. 890 (1878) 23

Twentieth Century Delivery Service v. St. Paul Fire and Marine Ins. Co., 9th Cir. 1957, 242 F. (2d) 292 .. 19

United States v. Great Lakes Towing Company, N. D. Ohio 1914, 217 Fed. 656 20

United States v. Nielson, 349 U. S. 129, 75 S. Ct. 654, 99 L. Ed. 939 (1955) 15

Vogelsang v. Delta Air Lines, Inc., 2nd Cir. 1962, 302 F. (2d) 709 19

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921) .. 19, 21

STATUTES.

28 U. S. C., Sec. 1254 2

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

46 U. S. C., Sec. 130 et. seq., Carriage of Goods by Sea Act 18

TEXTS.

175 A. L. R., 8-157, Annotation: Validity of a Contractual Provision by One other than a Carrier or Employer for Exemption from Liability, or Indemnification for Consequences of One's Own Negligence 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. .....

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Justices of the Supreme Court of the United States:

Petitioner, The Great Lakes Towing Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 22, 1964, vacating the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, entered on June 18, 1963, which had adjudged petitioner solely negligent and liable to respondent for damages arising out of a collision between the stern of respondent's Steamship Detroit Edison and a spile cluster along the face of the Inland

4 dock at Indiana Harbor, Indiana on May 23, 1961 while the steamer was being assisted by petitioner's Tug Montana on a bow towline, but limiting respondent's recovery to $1,837.50 plus costs in accordance with certain general terms and conditions contained in petitioner's 1959 tariff pursuant to which the movement of the steamship with the tug's assistance was undertaken.

OPINIONS BELOW.

The opinion for the United States District Court for the Northern District of Indiana, Hammond Division, including findings of fact, conclusions of law, memorandum decision, order amending findings no. 8 and no. 9 and amendment to memorandum, is not reported, but it is set forth in full in the joint appendix included in the record herein at pp. 382-399, 415-416. The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at printing but is set forth in full in the appendix to this petition at pp. 27-33. The judgment of the United States Court of Appeals for the Seventh Circuit is set forth in full in the appendix to this petition at p. 34.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on May 22, 1964. A petition for rehearing was filed on June 6, 1964. An order denying the petition for rehearing was made and entered by the United States Court of Appeals for the Seventh Circuit on June 17, 1964 and is set forth in full in the appendix to this petition at p. 35. The jurisdiction of this Honorable Court is invoked pursuant to 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is a provision in a towage contract, which states that when a self-propelled vessel under power is being towed or pushed stern first or winded (turned) by only one tug at her bow or stern the liability of the tug owner for damages arising out of the service shall not exceed $1,000.00, with provision for increase in the limit of liability upon advance written notice and payment of increased rates in the amount of 5% of the base rate for every $1,000.00 increase in the limit of liability, valid between the parties to the contract?

2. Is a provision in a towage contract, which states that no claim for delay of the vessel served for which the tug owner may be liable shall exceed $100.00 per day of delay, with provision for increasing the demurrage liability limitation upon advance written notice and payment of increased rates in the amount of 5% of the base rate for every $100.00 per day increase in the limit of liability, valid between the parties to the contract?

3. Was respondent's Steamer Detroit Edison, whose stern collided with a spile cluster along the face of the Inland # 4 dock on the outer basin at Indiana Harbor, Indiana, while she was being assisted stern first to the dock alone by petitioner's Tug Montana on a bow towline, negligent for failing to fulfill her duty of keeping a stern lookout for both vessels, for failing to convey to the tug the exact information noted by the steamer's stern lookout to the steamer's pilot house as to her course, speed and position with reference to the # 4 dock, for failing to warn the tug at her bow of danger at her stern, for failing to maintain a bow lookout and for operating her engines and rudder, without warning to the tug, in such a manner as to directly cause or contribute to the cause of the subsequent collision?

STATEMENT OF THE CASE.

Petitioner, The Great Lakes Towing Company, is and was on May 23, 1961 the sole owner and operator of the harbor Tug Montana which has an overall length of 84.3 ft., a beam (breadth) of 21.3 ft., is powered by a 1,400 h.p. diesel electric engine and is equipped with an F.M. radio-telephone in her pilot house. Respondent, American Steamship Company, is and was on May 23, 1961 the sole owner and operator of the Steamship Detroit Edison which is a self-unloader type steam vessel having an overall length of 604 ft., a beam (breadth) of 72 ft. and which is powered by a 7,000 h.p. steam turbine engine. The steamer's pilot house is located high on her bow, 26 ft. aft of her stem, and is equipped with both A.M. and F.M. radio-telephones. Communication between the steamer's pilot house and her fantail astern is by public address system and telephone. Communication between her pilot house and the forecastle deck forward is verbal.

Petitioner's tariff dated April 15, 1959 was published at that time and a copy of it was mailed to respondent at or about that time. Another copy of that tariff was mailed to and was received by respondent on or about April 20, 1960. The tariff included, *inter alia*, the following provisions;

> "11. The rates for service named herein are made upon the express condition that no claim for delay of any vessel served (whether due to repairs of damage or other cause), for which the Towing Company may be legally liable, shall in any case exceed One Hundred Dollars ($100.00) per calendar day of such delay. Upon written notice from the owner, charterer, or person having control of the vessel or vessels to be served to the Towing Company before the service is commenced, the above mentioned limit of liability upon demurrage claims may be increased, in which event the regular tariff rates will be increased five per cent of such rates

for every One Hundred Dollars ($100.00) of increase in the limit of the Towing Company's liability for demurrage specified in such notice, but in no event shall such liability exceed the actual legal liability of the Towing Company for such demurrage. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether by limitation of its liability under the Statutes of the United States or otherwise."

"16. When a self-propelled vessel under power is towed or pushed stern first by one tug at her bow or stern, or is being winded by one tug at her bow or stern, or when a tug or tugs are assisting any vessel in conjunction with a tug not owned or operated by the Towing Company, the liability of the Towing Company for damages arising out of the service shall not exceed One Thousand Dollars ($1,000.00). The amount may be increased by written notice to the Towing Company given by the owner, charterer, or person having control of the vessel or vessels to be served before the service is commenced, provided any rate as set forth in this tariff and as applicable to the service to be performed is increased in the amount of five per cent for every One Thousand Dollars ($1,000.00) that the Towing Company's liability is increased. Such amount shall constitute the total maximum liability of the Towing Company irrespective of the number of vessels served in the same service and irrespective of the number of claims asserted arising out of such service. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether on the merits or by limitation of its liability under Statutes of the United States or otherwise."

Immediately upon receipt of the tariff the chairman of respondent's Board of Directors wrote to petitioner protesting the efficacy of Article 16 and was in turn informed by petitioner's president that tug service would be rendered only in accordance with the terms of the tariff. Respondent replied on or about April 27, 1960 that it would avail itself

of tug service under protest and without prejudice to its right to challenge the tariff provision. No further change was made in the tariff and no further correspondence was exchanged between the parties between that date and the date of the accident.

Article 16 was first included in petitioner's tariff on April 15, 1956 and has continued in generally the same form in all of petitioner's tariffs to May 23, 1961.. No lake vessel or vessel owner ever availed itself of the increased liability provisions of Article 16 of the tariff. Article 11 was first included in petitioner's tariff on May 1, 1918 and was continued generally in the same form in all of petitioner's tariffs to May 23, 1961. No lake vessel or vessel owner ever availed itself of the increased liability provisions under Article 11 of the tariff during a period of 12 years prior to May 23, 1961. Respondent did not make any effort to avail itself of the increased liability provisions of Articles 11 or 16 in connection with the tow in question.

On May 23, 1961 the Steamer Detroit Edison arrived and docked port side to heading inland at the # 2 dock of the Inland Steel Company on the southeasterly side of the Indiana Harbor Canal at Indiana Harbor, Indiana. The canal is approximately 300 ft. in width and the berth of the Detroit Edison was approximately 1,100 feet southwest of the northerly end of the canal pierheads where the canal empties into the harbor basin. A large lake vessel and a smaller ocean type vessel were moored immediately astern of the Detroit Edison at the Inland Steel Company dock and a river barge was moored near the mouth of the canal on the opposite side at the Youngstown Sheet and Tube Company dock. The weather was favorable and in no wise was a factor in the ensuing events. The Detroit Edison discharged approximately one-half of her stone cargo so that there remained aboard her such cargo and water ballast as to give her a draft of 19 ft. 4 in. forward and

19 ft. 6 in. aft. The cargo remaining aboard the steamer was consigned to the Inland #4 dock which was 2,200 feet across the Indiana Harbor Basin from the mouth of the canal and approximately 3,300 feet from # 2 dock where the Detroit Edison then lay. Inland # 4 dock is a concrete dock. A line of wooden spile clusters are driven into the bottom of the harbor basin parallel with but approximately 30 feet out from the face of the concrete dock. The vessels using # 4 dock land against these spile clusters and tie up to them.

At about 6:30 p.m. on May 23, 1961, the first mate of the Steamer Detroit Edison called petitioner's Chicago tug office and requested the services of one tug to shift the steamer from Inland # 2 dock to Inland # 4 dock. About an hour later the Tug Montana, which had been lying in the vicinity of the outer end of the Indiana Harbor Canal, was dispatched to assist the Steamer Detroit Edison and sailed up the canal past the steamer, turned herself about and placed her starboard bow against the starboard bow of the steamer. The tug accepted the steamer's towline making it fast to the tug's forward towpost in such a manner that there was 60 to 75 feet of line between the stem of the steamer and the forward towpost on the bow of the tug. The vessels signaled to each other that they were ready to proceed. The masters of both vessels fully understood that the steamer was to move stern first down the canal and across the basin and was to turn and dock starboard side to at the # 4 dock of the Inland Steel Company. Both masters recognized that the operation would be a joint venture requiring their alert action and cooperation. During the course of the ensuing movement both vessels were manned by full crews of competent officers and men.

The steamer and the tug, working together, maneuvered the steamer to the center of the canal and in position to clear the vessels astern. Then, with the starboard bow of

the tug against the starboard bow of the steamer, the tug shoved the steamer astern, gathering momentum as the vessel moved stern first out the canal. The sternway of the Detroit Edison reached a maximum of 3 to 4 m.p.h. and she was moving at about such speed at a point two-thirds of the way across the basin, when the steamer's stern was approximately 600 feet away from the #4 dock. The tug initiated the movement astern of the steamer and provided such sternway as the steamer obtained.

As the steamer moved astern out the canal and when her bow cleared the piers at the mouth of the canal, the Tug Montana swung left into a position at a right angle to the length of the steamer with her starboard side at the steamer's bow so that she was working slowly across the steamer's bow with her towline leading at roughly a right angle off the steamer's starboard bow in order to start the steamer's bow swinging to the right. In this position the tug not only was working slowly off the steamer's starboard bow but also was dragging sideways behind the steamer. When the Detroit Edison's stern reached a point 600 feet away from the #4 dock and the vessel was still substantially in line with the canal but was starting to swing, her master, feeling that she was moving astern a little fast, without signal from or to the tug put the engines of the Detroit Edison slow ahead and ordered her rudder hard right. Her engines were worked slow speed ahead at 20 r.p.m. and her rudder was swung hard right to a 45 degree angle to starboard. Shortly thereafter when the stern of the steamer was 400 feet away from the #4 dock, the first mate, stationed on the steamer's fantail as stern lookout, began calling out distances over the loud speaking system to the steamer's pilot house. The first call from the first mate to the pilot house was that the ship was "400 feet off the stern from the pile clusters and coming back lively." On receiving this communication the master in the steam-

er's pilot house rang up half speed ahead on her engines, which were worked half speed ahead at 40 r.p.m. Approximately one or two minutes later the first mate on the steamer's stern reported to her pilot house that the stern had closed to within 300 feet and was not swinging sufficiently to clear the dock. The master then rang up full ahead on the steamer's engines which were worked full speed ahead at 60 r.p.m. The master then hollered out of the front window of the steamer's pilot house for someone on the steamer's bow to tell the tug to get the bow over and straighten her out, but the second mate, who was stationed on the steamer's bow as bow lookout but at that time had moved back along the starboard side of the pilot house to watch the crew prepare the boom swing cables for unloading, did not hear the captain's yell and did not relay his message to the tug so the captain had to go out on the steamer's starboard bridge wing and hollered down to the tug himself. The steamer's master both motioned and shouted to the tug watchman to have the tug pull the steamer's bow up to the right. This message was received by the tug watchman and transmitted to the tug's captain who was then working at a broad angle off the starboard bow of the Detroit Edison. The tug's engines were worked at full speed ahead with the towline at a right angle off the steamer's starboard bow. The master of the steamer returned to his pilot house and signaled the engine room for emergency full ahead engines. The steamer's engines were worked at emergency full ahead at better than 100 r.p.m. The first mate on the steamer's stern continued to call out distances of 200, 150, 72, 48, 36, 24 and 12 feet over the loud speaking system to the pilot house as the steamer's stern approached the #4 dock.

Despite the full ahead power of the Detroit Edison and an increased rate of swing to the right with decreasing sternway, the steamer continued to move astern until the

trailing edge of her rudder brushed against the fourth wood spile cluster from the west end of the #4 dock, causing substantial damage. Following contact between the rudder of the Detroit Edison and the spile cluster, the steamer came momentarily to a stop and her stern then swung to the left, cleared the clusters and continued to the left until the vessel came around parallel to the #4 dock. The steamer thereafter proceeded to land at the dock without further incident.

Other than the shout of the master of the steamer from her starboard bridge wing to the watchman aboard the tug at the time that the steamer's stern was somewhat less than 300 feet away from the #4 dock, there were no whistle signals, radio-telephone communications or verbal communications from the steamer to the tug from the time that the steamer left the #2 dock until after the time that the steamer's rudder came into contact with the spile cluster at the #4 dock. The master of the steamer never relayed to the tug or advised the tug of any of the communications which he received from the first mate acting as lookout on the steamer's stern. The master of the steamer never advised the tug in any respect as to the steamer's position, course and speed. Those aboard the tug were not even aware that the steamer had come into contact with the spile cluster until they were told about it by someone aboard the steamer sometime after it had occurred and just before the final docking of the steamer at #4 dock.

Respondent commenced this action by filing a libel in admiralty against petitioner in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to Article III, Section 2 of the Constitution of the United States and 28 U. S. C., Section 1333, which provides that the "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any

civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Following answer by petitioner and on motion of petitioner pursuant to 28 U. S. C., Section 1404(a), the case was transferred to the United States District Court for the Northern District of Indiana, Hammond Division, for trial.

After trial of the issues before the District Court, findings of fact, conclusions of law and a memorandum decision were entered holding the Tug Montana solely at fault and liable for damages arising out of the accident because she gave the steamer too much sternway, because she selected and initiated an unsafe course for the steamer across the basin on approach to the #4 dock and because she permitted the steamer's stern to come too close to the #4 dock before attempting to swing the vessel around for a landing, but also holding Articles 11 and 16 of petitioner's tariff to be valid and applicable. The court later reopened the evidence on respondent's motion and received further testimony and a stipulation of facts and thereafter amended its findings numbered 8 and 9 and filed an amendment to its memorandum decision reiterating its view that Articles 11 and 16 of petitioner's tariff were valid and binding. Final judgment was entered adjudging that the accident and damages sustained therefrom by respondent's Steamer Detroit Edison were solely the result of negligence and fault on the part of petitioner's Tug Montana but, on stipulation between the parties that the physical damage to the steamer exceeded the sum of $1,000.00 and that damages by way of demurrage to respondent exceeded the sum of $837.50 for 8.375 days of delay, limiting respondent's recovery to the total sum of $1,837.50 plus costs. Appeal and cross-appeal followed to the United States Court of Appeals for the Seventh Circuit. Following submission of briefs and after hearing oral arguments

from proctors for both parties, the Court of Appeals rendered its opinion and made and entered its judgment vacating the judgment of the District Court and remanding the case for proof of damages unlimited by Articles 11 and 16 of petitioner's tariff. Petition for rehearing was denied.

ARGUMENT.

The decision of the United States Court of Appeals for the Seventh Circuit should be reviewed by this Court because it directly conflicts with two prior decisions of the United States Court of Appeals for the Sixth Circuit, specifically and admittedly extends the scope of a decision of this Court beyond its prescribed limits, decides a question of maritime law in conflict with decisions of this Court and decisions of other courts of appeals in both the field of maritime law and other fields of transportation and communication and fails to take into consideration the well established rules of maritime law as to lookout and the obligations which were placed thereby upon respondent's steamship in the cooperative and joint venture undertaken by and between the steamship and petitioner's tug.

I.

THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE AND DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AS TO THE VALIDITY OF THE DEMURRAGE LIMITATION PROVISION OF PETITIONER'S TARIFF.

As was set forth in the statement of facts previously, Article 11 of petitioner's tariff, the demurrage liability limitation, was first included in the tariff on May 1, 1918 and was continued generally in the same form in all of petitioner's tariffs to May 23, 1961. In its opinion the United States Court of Appeals for the Seventh Circuit reversed the District Court and held Article 11 to be in-

valid. This decision is in direct conflict with prior decisions of the United States Court of Appeals for the Sixth Circuit which specifically upheld the validity of Article 11 of petitioner's tariff. *Hand & Johnson Tug Boat Line* v. *Canada S. S. Lines*, 6th Cir. 1922, 281 Fed. 779; *Great Lakes Towing Company* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543.

II.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE ADMITTEDLY EXTENDS THE SCOPE OF DECISIONS OF THIS COURT BEYOND THEIR INTENDED AND PRESCRIBED LIMITS.

The decision of the Court of Appeals in this case is specifically based upon decisions of this Court in *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955), and *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963).

For years there was conflict among the lower courts as to whether or not a tug could exempt itself by contract from all liability to a vessel in tow for the tug's own negligence. This conflict was based upon differences in interpretation of the decision of this Court in *The Syracuse*, 79 U. S. (12 Wall.) 167, 20 L. Ed. 382 (1871). The matter was settled when this Court rendered its decision in the *Bisso* case which held invalid a provision in a towage contract exempting the tower from all liability for its negligence. Careful reading of the majority decision in the *Bisso* case indicates that the rule against release-from-liability provisions in towage contracts established in that case is a rule against provisions providing for an exemption or release from *all* liability for negligent towage. There is no mention of any rule to prohibit *limitation* of liability for negligent towage in a towage contract, any rule against the

validity of demurrage limitation provisions or any rule against a tower's charging alternative rates based upon the risk involved in the service to be performed. In decisions rendered at the same time as that in the *Bisso* case, ***Boston Metals Co.*** v. *The S/S Winding Gulf*, 349 U. S. 122, 75 S. Ct. 649, 99 L. Ed. 933 (1955), and *United States* v. *Nielson*, 349 U. S. 129, 75 S. Ct. 654, 99 L. Ed. 939 (1955), this Court specifically continued to uphold the validity of pilotage release-from-liability clauses in towage contracts, although subjecting them to close scrutiny and strict construction.

In a later decision in *Southwestern Sugar & Molasses Co.* v. *River Term. Corp.*, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. (2d) 1334 (1959), this Court looked back and stated that, "In *Bisso* . . . this court held that a towboat owner might not, as a defense to a suit alleging loss due to negligent towage, rely on a contractual provision which purported to exempt the towboat *altogether* from liability for negligent injury to its tow" (Emphasis added). This Court went even further and stated that in the case of a towing tariff filed with the Interstate Commerce Commission, a clause purporting to exculpate a tug owner from *all* liability for his own negligence was not invalid as a matter of law but was subject to consideration and determination by the Interstate Commerce Commission, before court consideration, as to particular circumstances of the towing industry either favoring or disfavoring the validity of such a clause. In its most recent decision on the subject of such clauses, *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963), this Court again considered a release-from-liability, or *exculpatory*, clause but in that instance one whereby the tow specifically agreed with the tower to assume any damage claims urged by third parties as well as any claim urged by virtue of damage to the tow. In *Dixilyn* this Court again specifically limited its decision to "a contract which *exempts* the tower from

liability for its own negligence", commonly called an "*exculpatory clause*".

There is no decision holding that a tower cannot by contract *limit* its liability for its own negligence to a prescribed amount with provision for increase in the limit of its liability upon payment of increased rates for service proportioned to the risk assumed. There is no decision holding that a tower cannot charge alternative rates based upon the risk assumed for the service to be performed. By its own admission the Court of Appeals extended the reasoning of this court in *Bisso*, as reaffirmed in *Dixilyn*, to this case even though petitioner's tariff limits, rather than excludes, liability, stating as follows:

> "It is our opinion that the policy reasons underlying the *Bisso* decision—(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains, 349 U. S. at 91—and the commercial certainty called for by Justice Harlan in *Dixilyn* control our decision, even though the tariff provisions before us limit, rather than exclude, liability."

Extension by the Court of Appeals of the reasoning of the *Bisso* case to a limitation provision, or an alternative rate provision based upon risks assumed, in a towage contract is such a departure from that decision as to require this Court's review thereof.

III.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE DECIDES A QUESTION OF MARITIME LAW IN CONFLICT WITH EXISTING DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN THE FIELD OF MARITIME LAW AND OTHER FIELDS OF TRANSPORTATION AND COMMUNICATION.

The decision of the Court of Appeals in this case holds invalid two provisions in a towage contract between Petitioner and Respondent: Article 16 of petitioner's tariff which limits the liability of petitioner in a one tug, stern first or winding (turning) operation to $1,000.00 with provision for increases in the amount of the limitation in $1,000.00 increments upon payment of increased rates in 5% increments, and Article 11 which limits petitioner's liability for demurrage in any case to $100.00 per day with provision for increases in the limit upon payment of increased rates. Of course, Article 16 is applicable only when the customer elects to use but one tug in the operation. If the customer chooses to use two tugs, it is not applicable.

Courts have uniformly upheld provisions in transportation contracts which limit the carrier's liability to a fixed amount with an option to increase the limit of liability by payment of increased rates proportioned to the risk assumed. As long as they are not unfairly imposed, the charging of alternative rates based upon the risk assumed has been validated by this Court and other courts of appeals. In *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717 (1884), this Court clearly stated that a common carrier could not exempt itself from liability for its own negligence but squarely held that it could limit its liability by contract based upon valuation, provided the shipper could declare a higher valuation and pay an in-

creased rate therefor. Such also was the decision of this Court in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1912).

In *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788 (1889), the doctrine of the *Hart* case was extended to water carriers and in so doing this the Court interpreted the *Hart* case as upholding a limitation clause based on valuation. In its decision this Court pointed out that while the rationale for prohibiting a carrier from *exempting* itself from liability for its own negligence was based upon the carrier's superior bargaining position, the rationale for permitting the carrier to *limit* its liability by contract based upon valuation, provided the shipper could declare a higher valuation and pay an increased rate therefor, was to place the carrier back on an equal bargaining position with the shipper, rather than in a poorer bargaining position because of the requirement that the carrier serve all customers requesting service equally and the rule prohibiting the carrier's *exempting* itself from liability for its own negligence. This was affirmed by this Court in *The Ansaldo San Giorgio I* v. *Reinstrom Bros. Co.*, 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016 (1935), and *Smith* v. *The Ferncliff*, 306 U. S. 444, 59 S. Ct. 615, 83 L. Ed. 862 (1939). In *Petition of Isbrandtsen Company*, 2nd Cir. 1953, 201 F. (2d) 281, the Court of Appeals for the Second Circuit considered a situation involving ten locomotives and tenders which were shipped by water carrier and subsequently lost at sea. The shipment was not subject to the Carriage of Goods by Sea Act, 46 U. S. C., Sec. 130 *et seq.*, but a clause in the marine bill of lading covering the shipment incorporated the Carriage of Goods by Sea Act by reference. The court held that by incorporating the Act in the bill of lading, the water carrier's liability per package or freight unit was limited to $500.00 as prescribed by the Act because, under the Act, the ship-

per could have avoided the limitation by declaring in writing the nature and higher value of the goods and paying extra freight thereon. The court found the provision incorporated into the contract between the parties to be binding even though the shipping cost alone was $10,000.00 per unit of locomotive and tender. The Court limited the carrier's total liability to $5,000.00, even though it had already collected $100,000.00 in freight.

As to air carriers, the lower courts have gone even further and have upheld exculpatory or release-from-liability provisions. *Lichten* v. *Eastern Airlines, Inc.*, 2nd Cir. 1951, 189 F. (2d) 939; *Vogelsang* v. *Delta Air Lines, Inc.*, 2nd Cir. 1962, 302 F. (2d) 709; *Twentieth Century Delivery Service* v. *St. Paul Fire and Marine Ins. Co.*, 9th Cir. 1957, 242 F. (2d) 292. Of course, in the case of air carriers there is strict control by the Civil Aeronautics Commission as to rates so that these decision would appear to be in line with that of this court in *Southwestern Sugar & Molasses Co.* v. *River Term. Corp.*, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. (2d) 1334 (1959), wherein it was held that even an exculpatory clause in a towing tariff filed with the Interstate Commerce Commission was not invalid as a matter of law but was subject to the consideration and determination of the regulatory agency.

In the case of telegraph companies, contracts for limited liability, or the charging of alternative rates for the sending of messages based upon the risk to be assumed by the telegraph company in case of loss due to its negligence, have long been upheld as valid. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921); *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915).

In *Midland S. S. Line, Inc.* v. *Tug Arkansas*, 6th Cir. 1956, 232 F. (2d) 81, the Court of Appeals for the Sixth

Circuit considered a situation wherein an attack was made upon the validity of a clause in petitioner's tariff invalidating claims in the event of failure to fulfill specific requirements as to giving notice of claim within 30 days of the date of injury and reasonable opportunity to examine damages before repairs. The court upheld the validity of the provision, even though it was more of an exculpatory clause than a limitation clause, stating as follows:

> ". . . We agree with the District Court that the provision is valid and enforceable. While a towboat owner may not validly contract against all liability for his own negligence" (citing the *Bisso* case) "common carriers may impose just and reasonable limitation upon their common-law liability not amounting to an exemption from the consequence of their own negligence."

It is to be noted that this decision in the Sixth Circuit was rendered after and in light of the *Bisso* case. The decision of the Court of Appeals for the Seventh Circuit in this case is certainly in conflict with the statement quoted above from the Sixth Circuit.

The Court of Appeals for the Seventh Circuit extends the reasoning of this Court in *Bisso* to petitioner in this case on the basis that "with its monopolistic position on the Great Lakes it has the 'power to drive hard bargains.'" That petitioner is a virtual monopoly as to some services in certain Great Lakes ports was long ago determined in *United States* v. *Great Lakes Towing Company*, N. D. Ohio 1914, 217 Fed. 656. However, pursuant to that decision, petitioner was permitted to continue in business as a matter of public policy for the good of shipping on the Great Lakes but subject to the terms and conditions of a continuing and permanent injunction. That injunction is set forth in full at pp. 36-41 of the appendix hereto. The Court of Appeals in this case has failed to recognize the

full impact of the 1914 anti-trust injunction which contains provisions specifically made similar to the original Interstate Commerce Act and which prohibits petitioner from refusing or neglecting to furnish service in accordance with any request therefor. The injunction contains prohibitions against many practices and assures that the rates charged for petitioner's services will be reasonable by prohibiting rate cuts from petitioner's regular schedule of tariff rates except to meet, but not go below, competition and by providing that in no event can rates be fixed below actual cost of service or cut more than 25% at any one time. Even though petitioner may presently be a *de facto* monopoly as to some types of service at certain ports on the Great Lakes, it has no franchise or exclusive right thereto. Competition may arise at any time and petitioner must constantly be cognizant of that fact and fix its rates accordingly. Petitioner is actually in the identical situation in which the Western Union Telegraph Company found itself in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921), wherein this Court upheld the charging of alternative rates based upon the risk assumed with limitation of liability for negligence thereto.

The decision of the Court of Appeals in this case is an unwarranted extension of the reasoning of this Court in *Bisso* and contrary to other decisions of this Court and decisions of other courts of appeals upholding limitation of liability provisions, or the charging of alternative rates based upon the risk assumed, in all other transportation fields, as well as in the field of water transportation. This Court made it very clear in the *Bisso* case that the rule prohibiting contractual exculpatory provisions was merely an extension to the towage business of a general rule used by the courts with reference to other fields. The Court specifically referred to the fields involving bailors and

bailees, employers and employees, and public service companies and their customers. In a footnote with regard to those references, the Court cited a lengthy annotation in 175 A. L. R. 8-157 dealing with the validity of a contractual provision by one other than a carrier or employer for exemption from liability, or indemnification for the consequences of one's own negligence. Throughout the annotation with reference to the various relationships covered, the validity of such exemption provisions is generally said to be upheld where the parties to the contract bargain on an equal footing. They are generally declared invalid as against public policy where the party, such as a public utility, etc., seeking to enforce the provision has bargained from a superior position. The annotation indicates that it is almost uniformly held in all fields that a *limitation provision*, containing an option as to the assumed risk based upon a rate differential, is valid and binding.

IV.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE, AS WELL AS THE DECISION OF THE DISTRICT COURT, FAILED TO CONSIDER AND APPLY THE WELL ESTABLISHED RULES OF MARITIME LAW AS TO LOOKOUT AND THE OBLIGATIONS WHICH THEY PLACED UPON RESPONDENT'S STEAMSHIP IN THE COOPERATIVE AND JOINT VENTURE UNDERTAKEN BY AND BETWEEN THE STEAMSHIP AND PETITIONER'S TUG.

Both of the lower courts in this case clearly failed to consider and apply the following well settled rules: the Steamer Detroit Edison, as a large vessel being assisted in a stern first movement alone by the Tug Montana at her bow, was charged with the duty of maintaining a lookout astern for both vessels, *The Senator D. C. Chase*, 2nd Cir. 1901, 108 Fed. 110, *Nassau Barge Corp.* v. *The Fred B. Dalzell*, 2nd Cir. 1950, 180 F. (2d) 560, *Farrell Lines* v.

S. S. Birkenstein, et al., S. D. N. Y. 1962, 207 F. Supp. 500, *Canada Steamship Lines, Ltd.* v. *Great Lakes Towing Company*, N. D. Ohio 1932, 1932 A. M. C. 563; the Steamer Detroit Edison was charged with the duty of warning the Tug Montana of any danger astern, *The Virginia Ehrman* v. *Curtis*, 97 U. S. 309, 24 L. Ed. 890 (1878), *Reiss S. S. Co.* v. *Great Lakes Towing Co.*, 8th Cir. 1949, 177 F. (2d) 681, affirming, D. C. Minn. 1948, 79 F. Supp. 1, *American S. S. Co.* v. *Great Lakes Towing Co.*, N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156, *Canada Steamship Lines, Ltd.* v. *Great Lakes Towing Co.*, N. D. Ohio 1932, 1932 A. M. C. 563, *The Vale Royal*, D. C. Md. 1943, 51 F. Supp. 412, *The Coleraine*, E. D. N. Y. 1910, 179 Fed. 977; the Steamer Detroit Edison was charged with the duty of maintaining a bow lookout, *Reiss S. S. Co.* v. *Great Lakes Towing Co.*, 8th Cir. 1949, 177 F. (2d) 681, *American Steamship Co.* v. *Great Lakes Towing Co. and City of East Chicago, Indiana*, N. D. Ind. 1960, 1961 A. M. C. 391; one of the duties of the steamer's bow lookout, included in looking and keeping the steamer's pilot house advised, was to relay orders from the steamer's pilot house to the tug, *American Steamship Co.* v. *Great Lakes Towing Company and City of East Chicago, Indiana*, N. D. Ind. 1960, 1961 A. M. C. 391. The master of the Steamer Detroit Edison, up high in her pilot house with a clear view and understanding at all times of the steamer's position, course and speed as she moved astern and with full information from her stern lookout as to the position of the steamer's stern with reference to the Inland #4 dock which she was approaching, communicated none of the information in his possession and which was communicated to him by his stern lookout to the Tug Montana either by whistle signal, by radio-telephone or by verbal communication, except for the one time when the steamer's

stern was somewhat less than 300 ft. away from the #4 dock when he did go out on the steamer's starboard bridge wing and call down to the tug to pull the steamer's bow up to the right. The captain of the Detroit Edison started to work her engines slow ahead when her stern was 600 ft. from the Inland #4 dock because he felt that the steamer was moving astern too fast. The steamer's first mate started calling out distances over the steamer's loud speaking system to the pilot house when her stern was 400 ft. away from the #4 dock and continued to call distances to the pilot house all the way down to the point of collision. The captain of the steamer worked his engines half speed ahead at 400 ft., full speed ahead at 300 ft. and emergency full speed ahead after he called to the tug to pull to the right. None of this information as to the steamer's speed moving astern, the rate of her swing to come alongside the dock, the distances of her stern from the approaching #4 dock, use of the steamer's engines and any danger of a collision was transmitted from the steamer's pilot house to the tug, even though the captain of the steamer knew that the tug, down low in the water at the steamer's bow with the full 604 ft. length and 72 ft. breadth of the steamer blocking its view of anything astern of the steamer, was totally dependent upon the steamer for information as to her position course and speed and warning as to danger astern. The fact that a lookout is properly stationed on a vessel is of no consequence unless he performs his duty. The Steamer Detroit Edison, being charged with the duty of lookout astern for both vessels and the duty to warn of any impending danger astern, by her lack of communication of any information or warning to the tug at her bow clearly breached its duty of maintaining a lookout astern. It is undisputed that the one communication from the steamer to the tug, which was simply for the tug to pull the steamer's bow up to the right and nothing more, was

immediately complied with by the tug. The further fact that the third mate stationed on the steamer's bow as bow lookout was either out of position or devoting his attention to the preparation of the boom swing cables for unloading, or both, so that he failed to hear and relay to the tug the initial call of the steamer's captain, thereby forcing the captain to go out on the steamer's starboard bridge wing and call down to the tug himself, was clearly a failure of bow lookout on the part of the steamer. It resulted in delay of the one and only communication from the steamer to the tug and probable delay in finally working the steamer's engines emergency full ahead.

Under the rule of *The Pennsylvania* v. *Troop*, 86 U. S. (19 Wall.) 125, 22 L. Ed. 148, 151 (1874), the failure of both stern and bow lookout on the part of the steamer placed upon respondent the burden of proving not only that such failure might not have caused the resultant collision or probably did not cause it but that it *could not* have caused it. *Circle Line Sightseeing Yachts, Inc.* v. *The City of New York*, 2nd Cir. 1960, 283 F. (2d) 811; *Afran Transport Company* v. *M/T Bergechief*, 2nd Cir. 1960, 270 F. (2d) 469. The failure of lookout at both ends of the Steamer Detroit Edison raised a presumption of negligence on the part of the steamer and *The Pennsylvania* rule placed a heavy burden of proof upon respondent. Not only did respondent fail to sustain the unusually heavy burden of *The Pennsylvania* rule but it is difficult to understand how it can be said that the steamer even performed its share, or any share at all, in the cooperative and joint venture undertaken by the two vessels because respondent offered no proof at all to excuse itself. The trial court made no findings concerning the obligations of lookout at either end of the steamer, the actions and lack of action in regard thereto, and the almost complete failure on the part of the steamer to communicate with and warn the tug.

The Court of Appeals made no reference at all thereto. It is submitted that, regardless of the action or lack of action on the part of the Tug Montana during the course of the steamer's movement, there was a serious and substantial failure of lookout at both stern (via the steamer's pilot house) and bow on the part of the steamer by reason of the failure to communicate information to and warn the tug. This was at best a material lack of cooperation in the cooperative and joint venture and at worst such fault as required the steamer to prove not only that it might not have caused or that it probably did not cause but that it *could not have caused* the subsequent collision. In either case, no offsetting proof was offered and the steamer was causally negligent and should have been held at fault, either alone or in conjunction with the Tug Montana.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Nos. 14350, 14351 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

AMERICAN STEAMSHIP COMPANY, *Libelant-Appellant (Cross-Appellee)*, v. THE GREAT LAKES TOWING COMPANY, *Respondent-Appellee (Cross-Appellant)*. } Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 22, 1964

Before HASTINGS, *Chief Judge*, CASTLE and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. The questions raised are whether the district court erred in deciding respondent tug company was solely liable for negligence in causing damages to libelant's steamer, the Detroit Edison, and whether the court erred in applying respondent's tariff to limit alleged damages of $91,044.20 to the sum of $1,837.50. We hold the decision on liability was not erroneous, but that the court erred in deciding respondent's pertinent tariff provisions were valid and in limiting recovery accordingly.

The tug Montana, on May 23, 1961, was engaged by libelant to tow the Detroit Edison from a berth in the

Indiana Harbor canal to Inland Steel Company's #4 dock in the Indiana Harbor Ba in. Detroit Edison's own engines, aided by the Montana, moved her to the center of the canal. The Montana alone initiated the Detroit Edison's movement astern, working her starboard bow. She was pushed astern from the canal into the basin. The problem then was to move her 2,200 feet across the basin to the dock opposite the mouth of the canal. This required a turning (winding) maneuver of 90 degrees so that the Detroit Edison would be landed in her new berth parallel to the dock. Although the weather was good, the maneuver failed, Detroit Edison's rudder hit a wooden spile cluster near the concrete dock and was damaged.

The conclusion of negligence was based on ultimate fact findings that the tug Montana, in furnishing the sole motor power for the movement, gave the Detroit Edison "too much sternway," selected and indicated an unsafe course across the basin for approach to the #4 dock, and permitted the stern of the Detroit Edison to come too close to the dock before attempting to move her parallel for a landing.

There was testimony from which the district court could reasonably infer that the Montana's captain, who had knowledge of the basin and had undertaken the admittedly cooperative movement with one tug, negligently failed to begin the winding maneuver in time; that this negligence created an emergency in which the steamer's master, until then relying on the seamanship of the Montana's captain, to avoid collision ordered the steamer's engines ahead in gradual acceleration and signalled the Montana to bring the steamer's "bow up"; and that the Montana's response was too late to complete the maneuver safely.

Cross-examination of both the master and captain developed some inconsistencies and contrarieties, but these presented credibility judgments for the district court and

not for us. There is substantial evidence to support the district court's findings and they are not clearly erroneous. We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), *United States* v. *M/V Martin*, 313 F. 2d 851, 852 (7th Cir. 1963). The conclusion based on the findings is not erroneous.

Libelant contends that Articles 11 and 16[1] of respondent's tariff are invalid as contrary to public policy. Article 16 purports to limit respondent's liability for damages to $1,000 in cases of asternway movement by one tug, and Article 11 purports to limit respondent's liability for

---

[1] The relevant tariff provisions are as follows:

"11. The rates for service named herein are made upon the express condition that no claim for delay of any vessel served (whether due to repairs of damage or other causes), for which the Towing Company may be legally liable, shall in any case exceed One Hundred Dollars ($100.00) per calendar day of such delay. Upon written notice from the owner, charterer, or person having control of the vessel or vessels to be served to the Towing Company before the service is commenced, the above mentioned limit of liability upon demurrage claims may be increased, in which event the regular tariff rates will be increased five per cent of such rates for every One Hundred Dollars ($100.00) of increase in the limit of the Towing Company's liability for demurrage specified in such notice, but in no event shall such liability exceed the actual legal liability of the Towing Company for such demurrage. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether by limitation of its liability under the Statutes of the United States or otherwise.

* * * * *

"16. When a self-propelled vessel under power is towed or pushed stern first by one tug at her bow or stern, or is being winded by one tug at her bow or stern, or when a tug or tugs are assisting any vessel in conjunction with a tug not owned or operated by the Towing Company, the liability of the Towing Company for damages arising out of the service shall not exceed One Thousand Dollars ($1,000.00). This amount may be increased by written notice to the Towing Company given by the owner, charterer, or person having control of the vessel or vessels to be served before the service is commenced, provided any rate as set forth in this tariff and as applicable to the service to be performed is increased in the amount of five per cent for every One Thousand Dollars ($1,000.00) that the Towing Company's liability is increased. Such amount shall constitute the total maximum liability of the Towing Company irrespective of the number of vessels served in the same service and irrespective of the number of claims asserted arising out of such service. Nothing herein contained shall be construed to deprive the Towing Company of any legal defense it may have whether on the merits or by limitation of its liability under Statutes of the United States or otherwise."

demurrage during repairs to $100 a day. Escalation provisions are provided in each article so that if the tow gives respondent prior notice and pays an additional fee respondent's liability will be increased—$1,000 of additional liability for damages and $100 of additional demurrage for each additional fee increment of five per cent.

The limitation in Article 16 appeared first in 1956, and since its promulgation no customer had ever availed itself of the escalation provisions; nor had any customer availed itself of the escalation provisions of Article 11. When the tariff was published, libelant took exception to Article 16, reserving its right to question the ultimate legal effect of the limitation. To avail itself of the escalation provisions related to the damages at issue in this case, even if they could be anticipated, libelant demonstrated that the tug charges for the tow would have been increased almost six times—to $1,798.03.[2]

In a number of recent admiralty cases the Supreme Court has laid down a strong policy against clauses attempting to release wrongdoers from the effects of their negligence. In *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (May 16, 1955), the Court held, on public policy grounds, that a towage company cannot release itself by contract from all liability for its negligence causing damage to its tow. The same day the Court in *Boston Metals Co.* v. *The Winding Gulf*, 349 U. S. 122, struck down a clause in a towage contract which provided the master and crew of the tug would be servants of the tow and not responsible for negligent towage. And in April, 1963, the Supreme Court, *per curiam*, "adhered to the rule laid down in *Bisso* and *Winding Gulf*" and invalidated an indemnification clause in a towing contract reached after arm's length bargaining.

---

2 The charges for the operation in question were $304.75. By the terms of Article 16, if two tugs had been employed in the maneuver, at a cost of $609.50, the limitation in that article would not be effective.

Dixilyn Drilling Co. v. *Crescent Towing & Salvage Co.*, 372 U. S. 697.

It is true that in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, 421 (1959), the Court stated:

> "We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I. C. C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause, if any there be, or which militate toward a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulation."

The Court refused "automatically to extend the rule of *Bisso*" to *Southwestern Sugar* because *Bisso* did not involve "a pervasive regulatory scheme." The tariff before us, as in *Bisso*, was not subject to regulation by public authority.[3] And Justice Harlan, who wrote the majority opinion in *Southwestern Sugar*, in a concurring opinion in the subsequent *Dixilyn* case stated that "the overriding certainty of law in the kind of commercial transaction involved, would not be promoted by" opening the *Bisso* rule to indeterminate exceptions, where, unlike *Southwestern Sugar*, no functions of a regulatory agency are involved.

---

[3] Respondent, though not a common carrier, has been put substantially on that basis through an anti-trust decree. *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N. D. Ohio, 1914). It is not subject to the Interstate Commerce Commission, and its tariffs are under its own control subject only to the terms of the anti-trust decree.

[4] The court found:

"16. The contemplated maneuver under weather conditions and daylight prevailing at the time of this disaster was not an unusual tug maneuver and is and was frequently performed by one tug assisting a steamer on her bow."

[5] The court found:

"9. That the Great Lakes Towing Company has a virtual monopoly in the business of towing large bulk lake steamers for hire in all of the major United States port[s] of the Great Lakes except Green Bay-Manitowac and Bay City-Saginaw."

The district court in the case at bar thought that since Article 16 limited liability only "where there is asternway movement by one tug"—an "obviously * * * difficult and somewhat hazardous operation"—the limitation was not unreasonable "[u]nder such circumstances." That this holding is based on conclusions seemingly contrary to its findings[4] is immaterial, since it is our opinion that the Supreme Court's reversal of the court of appeals in *Dixilyn Drilling Co.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697 (1963), *reversing* 303 F. 2d 237 (5th Cir. 1962), has effectually repudiated the Court's statement in *Southwestern Sugar* that "peculiar hazards" may not be bound by *Bisso* but may call for "development of * * * a particularized rule to deal with particularized circumstances." 360 U. S. at 419-420.

It is our opinion that the policy reasons underlying the *Bisso* decision—"(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains," 349 U. S. at 91—and the commercial certainty called for by Justice Harlan in *Dixilyn* control our decision, even though the tariff provisions before us limit, rather than exclude, liability.

Respondent was the negligent wrongdoer liable for payment of libelant's damages; and with its monopolistic position in the Great Lakes[5] it has the "power to drive hard bargains." Articles 11 and 16 must fall. An additional reason for invalidating Article 16 would be that there is no commercial "certainty" as the escalation provision has little meaning where the owner cannot anticipate the measure of damages to its vessel, and make a judgment about higher valuations and rates accordingly.

We have considered the reasons advanced by respondent for upholding the validity of Articles 11 and 16 but find them unavailing.

The court did not err in deciding respondent's negligence was the sole cause of the damages. It did err, however, in deciding the tariff provisions in Articles 11 and 16 are valid. The judgment is vacated and the cause remanded for proof of damages unlimited by Articles 11 and 16 of respondent's tariff.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, May 22, 1964.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

AMERICAN STEAMSHIP COMPANY,
Libelant-Appellant,
(Cross-Appellee),

No. 14350-51 *vs.*

THE GREAT LAKES TOWING COMPANY,
Respondent-Appellee,
(Cross-Appellant).

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED, and that this cause be, and it is hereby REMANDED to the said District Court for proof of damages unlimited by Articles 11 and 16 of respondent's tariff, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs in these appeals be taxed in favor of libelant-appellant (cross-appellee) American Steamship Company.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago, Illinois, 60610.

Wednesday, June 17, 1964.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

AMERICAN STEAMSHIP COMPANY,
Libelant-Appellant;
(Cross-Appellee),

No. 14350-51 *vs.*

THE GREAT LAKES TOWING COMPANY,
Respondent-Appellee,
(Cross-Appellant).

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Northern District of Ohio, Eastern Division.

No. 8003 Equity

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE GREAT LAKES TOWING COMPANY, *et al.*,
Defendants.

FINAL DECREE.

(Filed June 15, 1914.)

This case was heard, upon pleadings and proofs, before Circuit Judges of the Sixth Judicial Circuit, under the Expediting Act of Feburary 11, 1903, Chapter 544 (32 Stat. L., 823).

Upon consideration whereof, and being fully advised in the premises, the Court, on the issues joined, adjudges and decrees as follows:

1. That the defendant, The Great Lakes Towing Company, and the corporations controlled by it, to-wit: the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line and the Great Lakes Towing Company, Ltd., constitute and are a combination in restraint of trade and commerce between the several states of the (United States,) and between the states of the United States and Canada, in violation of the Act of Con-

gress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies" (Act July 2, 1890, Ch. 647, 26 Stat. L. 209).

2. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and each of them, their officers, agents, directors, servants, employees and successors, are hereby restrained and enjoined from directly or indirectly carrying on the business of vessel towing, either alone or in connection with wrecking, boiler testing and bottom work (or any one or more of said three last named classes of business), upon the Great Lakes and their tributaries, except in strict compliance with each of the requirements of this decree and in strict observance of the several injunctions hereby imposed.

3. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and each of them, their officers, agents, directors, servants, employees and successors, are hereby perpetually restrained and enjoined from making or entering into (any contract, agreement or arrangement) with any person, persons, partnership, corporation or concern, to monopolize any part of the trade and commerce among the several states or with foreign nations, in or with respect to the business of vessel towing, either alone or in connection with wrecking, boiler testing and bottom work, or any one or more of the three classes of business last named, upon the Great Lakes and their tributaries.

4. That the defendants, the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, and the Hand & Johnson Tug Line,

and each of them, their officers, agents, directors, servants, employees and successors, are hereby perpetually restrained and enjoined, subject only to the qualifications hereafter expressed herein, from (a) entering into any contract, agreement or arrangement with any person, persons, partnership, corporation or concern, for joint services or for the pooling of receipts, or for suppressing, controlling or interfering in any manner with freedom of competition in any port or ports on the Great Lakes, whether or not the defendants above named, or either of them, shall be engaged in business in such port or ports; (b) entering into any agreement, contract or understanding, direct or indirect, with any customer, new or old, for the exclusive furnishing of the whole or any part ofthe towing or any other service of such customer, except the single item of service then immediately to be performed, and either as respects but one port or place, to the end that the ultimate rate to each customer shall be absolutely the same for each like, contemporaneous item of service; (c) giving or agreeing to give to any customer any rate, concession, discount or rebate, except such as are given equally and without discrimination to all customers for the like service, regardless of whether or not such customers are stockholders in the towing company, and regardless of the amount or proportion of their custom furnished to the towing company, or whether custom is given in whole or in part either at all or at any one or more of the ports where the towing company does business, or whether the custom so given relates to but one class or to more than one class of business so done by the towing company, *viz.*, towing, wrecking, boiler testing and bottom work or for any other reason whatever—to the end that the ultimate rate to each customer shall be absolutely the same for each like or contemporaneous and similar item of service; (d) giving any preference or priority of service, in point of time, to any customer, except

as based upon the order in which application for such item of service is made; (e) refusing or neglecting to furnish service as speedily as practicable to any applicant therefor, except where refusal to render service to such applicant is justified by a good faith belief, communicated to the customer, that payment for such service will not promptly be made; (f) making or giving any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, transportation, or other business, in any respect whatsoever; or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, transportation or business, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; (g) engaging in so-called "rate-wars," or making competitive cuts from its regular schedule of tariff rates, relating to any kind of service furnished by the towing company, except that to meet (but only to meet, and not to go below), actual rates made by the competitor or competitors for the same kind and quality of service, the towing company may cut not exceeding twenty five per cent from its regular tariff rates; provided further, that such cut shall not reduce the rate below the actual cost of such service, nor shall it be made in any case under circumstances constituting in fact unfair or fraudulent competition; and in all cases where such cuts are made from regular tariff schedules a record of the facts and circumstances shall be kept and immediately furnished to the commissioner, if one shall be provided for; (h) entering into any contract, agreement or understanding whereby the person, partnership or corporation from whom or from which any tug, tugs, or other property are purchased from the towing company, or obtained under lease, charter or exchange, is forbidden to engage either in the towing business or in any other class of business in which the towing company

may be engaged at any place or to any extent whatever; (i) entering into any contract, agreement or understanding whereby the person, partnership or corporation to whom or to which any tug, tugs, or other property is sold by the towing company, or leased, chartered or exchanged, whereby any limitation is imposed as to the use which may be made of such tug, tugs, or other property, or as to the ports in which they shall be operated or kept.

5. The towing company shall from time to time publish and keep on file in its office for public inspection by any person desiring to see the same, printed tariffs showing the charges to be made for towing and for all other classes of service in which the towing company may engage, at each port in which the company regularly has tugs stationed or in which it performs towing or other service. The tariff shall plainly show all charges to be made for towing and for each other class of service, and a schedule shall be made for each port. The charges not only for towing, but for all classes of service, shall be based upon the various kinds and degrees of service, the size and business of ships, and the season in which the service is to be rendered. For this purpose proper and equitable classifications may be made; but always on the basis of equality between, and without discrimination among, the customers of the towing company, for any reason whatever.

6. Unless the towing company shall, by writing, file in this cause within thirty days from the filing and notice of this decree, or within such further time as may be given for the purpose, its consent and agreement to be bound by all the foregoing terms and conditions of this decree, the Court will immediately proceed to create a receivership of the physical properties of the towing company, with power to operate said properties and carry on the business of said towing company subject to such further orders as may be made in this cause.

The towing company is hereby restrained and enjoined, during the time limited for the filing of such consent and agreement, from ceasing or suspending, in whole or in part, its towing service or any service in which it is now engaged.

7. The appointment and selection of a receiver, as well as the determination of his powers and duties, and the directions to be given, are reserved until the expiration of the time given the towing company for the consent and agreement provided for in the sixth paragraph of this decree, as are also the terms and provisions of the plan of sale of the properties of the towing company under such receivership.

8. The bill of complaint herein is hereby dismissed as to the defendant, the Pittsburgh Steamship Company.

9. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree, or taking such other action, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree, including provision for commissionership to aid in such enforcement.

10. Any party to this cause, or any one succeeding to the rights of said party, in whole or in part, may make application to the Court at any time for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree.

J. W. WARRINGTON,
Circuit Judge,

L. E. KNAPPEN,
Circuit Judge,

A. C. DENISON,
Circuit Judge.

Office-Supreme Court, U.S.
FILED
SEP 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S ANSWERING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FENTON F. HARRISON,
COFFEY, HEFFERNAN & HARRISON,
1317 Chamber of Commerce Bldg.,
Buffalo 2, New York,
Proctors for American Steamship Company, Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

PAGE

Statement of the Case 1

The Issues and Holdings Below 2

Argument 4

QUESTION I. The alleged direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and the decisions of the United States Court of Appeals for the Sixth Circuit refers to decisions of the Sixth Circuit made before the law of towage was settled by this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85 (1955). There is, therefore, no direct conflict 4

QUESTION II. The decision of the Court of Appeals in this case is in complete accord with the decisions of this Court 5

QUESTION III. Petitioner cites no authority to support its contention that a non-regulated monopoly such as the Great Lakes Towing Company is entitled to any special consideration with respect to the basic rules of liability 8

QUESTION IV. The issue of liability was essentially a question of fact which was determined adversely to petitioner in the District Court and affirmed by the Court of Appeals. No new authority or proposition of law has been cited by petitioner 12

CONCLUSION. For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied 13

TABLE OF CASES.

American Bridge Division U. S. Steel Corp. v. Roen Steamship Company, DC Wisc. 1963, 216 F. Supp. 353, Aff'd. 7th Cir., 1964, 328 F. 2d 838 ..... 8, 9

Bisso v. Inland Waterways Corp., 349 U. S. 85 (1955) 3, 4, 5

PAGE

Boston Metals Company v. S/S "Winding Gulf", 349 U. S. 122 (1955) 3
Continental Grain Co. v. American Commercial Barge Line Co., 7th Cir., 1964, 332 F. 2d 26 9
Continental Oil Company v. M. S. Glerville, DC Tex. 1962, 210 F. Supp. 865 13
Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U. S. 697 (1963) 3, 6, 7
Great Lakes Towing Co. v. Bethlehem Transp. Corporation, 6th Cir., 1933, 65 F. 2d 543 4
Hand & Johnson Tug Line v. Canada S. S. Lines, Ltd., 6 Cir., 1922, 281 Fed. 779 4
Hess Tankship Company v. S. S. M. L. Gosney, DC Vir. 1963, 230 F. Supp. 1 13
McAllister v. United States, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 (1954) 12
Mississippi Valley Barge Line Co. v. Inland Waterways Shippers Association, Inc., 8th Cir., 1961, 289 F. 2d 374, cert. den. 368 U. S. 876, 7 L. Ed. 2d 77, 82 S. Ct. 123 9
Mississippi Valley Barge Line Co. v. T. L. James & Co., DC La. 1956, 144 F. Supp. 662, Aff'd. 5th Cir., 1957, 244 F. 2d 263, cert. den. 355 U. S. 871, 2 L. Ed. 2d 76, 78 S. Ct. 121 ..... 9, 10
Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch & Co., Ltd., 4 Cir., 1963, 301 F. 2d 59 13
Southwestern Sugar & Molasses Co. v. River Terminals Corporation, 360 U. S. 411, 3 L. Ed. 2d 1334, 79 S. Ct. 1210 (1959) 7, 8, 11
Stevens v. The White City, 285 U. S. 195, 76 L. Ed. 699, 52 S. Ct. 347 (1932) 8
The Brooklyn, 2 Ben. 547, Fed. Case No. 1938 (1868) 8
The Syracuse, 79 U. S. 167, 20 L. Ed. 382, 12 Wall. 167 (1871) 8
United States v. Great Lakes Towing Co. *et al.*, DCND Ohio, 208 Fed. 733 ..... 6, 8

STATUTES.

Civil Aeronautics Act 8
Interstate Commerce Act 8
The Federal Communications Act 8

IN THE

Supreme Court of the United States

October Term, 1964

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S ANSWERING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Statement of the Case

Respondent accepts the statement of facts set forth in Pages 4 through 12 of the Petition with the following exceptions:

The Tug MONTANA took the position she did on the starboard bow of the Str. DETROIT EDISON so that she could see down the side of the DETROIT EDISON and keep the dock to which she was convoying the vessel in sight at all times.

With respect to the statement that the master of the Str. DETROIT EDISON never relayed information from his stern lookout to the tug, the evidence showed that the

MONTANA had the dock in sight at all times and there was no need for the Steamer to convey any information to the tug.

The engineers of the DETROIT EDISON had been watching the approach to the dock through the gangway and had anticipated the need for emergency full ahead power. Consequently, there was a continuous rise in the R. P. M.'s as shown on her pilot house tachometer from the time the master of the DETROIT EDISON first signaled full ahead to the time the propeller of the Steamer was turning over at better than 100 revolutions per minute. There was no delay in the resulting ahead power of the Steamer as suggested by Petitioner.

The Issues and Holdings Below

Two distinct issues were litigated in the District Court, namely, the issue of Petitioner's liability for negligent towage and the legality of Petitioner's tariff.

The District Court made remarkably detailed and complete Findings of Fact in support of its conclusion that the subject accident resulted solely from the negligence of Petitioner's Tug Montana. The Findings of the District Court were attacked by Petitioner in the Seventh Circuit, but the Court of Appeals has affirmed the District Court on the issue of liability noting (333 F. 2d 426 at 428):

> "* * * We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. *McAllister v. United States*, 348 U. S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954), *United States v. M/V Martin*, 313 F. 2d 851, 852 (7th Cir. 1963). The conclusion based on the findings is not erroneous."

The Petition raises no new or novel issue of law pertinent to the facts relative to the issue of liability.

The view of the Court of Appeals reversing the District Court and holding Petitioner's tariff invalid is in complete accord with the opinions of this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85 (1955); *Boston Metals Company v. S/S "Winding Gulf"*, 349 U. S. 122 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U. S. 697 (1963).

Actually the question presented to the Court of Appeals on the tariff issue was whether the Petitioner could accomplish precisely what this Court said it could not do by the semanticism of labeling exculpatory clauses a "limitation." The Court of Appeals, without disturbing any Findings by the District Court and after review of the record, has held the clauses violate the

> "* * * policy reasons underlying the *Bisso* decision—'(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains,' 349 U. S. at 91, 75 S. Ct. at 632 and the consideration of commercial certainty called for by Justice Harlan in *Dixilyn* * * * even though the tariff provisions before us limit, rather than exclude, liability." (333 F. 2d at 430.)

ARGUMENT

QUESTION I

The alleged direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and the decisions of the United States Court of Appeals for the Sixth Circuit refers to decisions of the Sixth Circuit made before the law of towage was settled by this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85 (1955). There is therefore, no direct conflict.

The Sixth Circuit actually considered the legality of Petitioner's tariff limitation pertaining to demurrage in 1922. *Hand & Johnson Tug Line v. Canada S. S. Lines, Ltd.*, 6 Cir., 1922, 281 Fed. 779 at 783, 784. Eleven years later, the same Court was called upon not to explore the legality of the demurrage limitations provision of Petitioner's tariff in depth, but to determine whether expenses for wages, food and fuel during a period of detention came within the purview of demurrage rather than special damages. *Great Lakes Towing Co. v. Bethlehem Transp. Corporation*, 6th Cir. 1933, 65 F. 2d 543. It is obvious, then that the legality of demurrage limitation has not been thoroughly considered for 42 years prior to the decision of the Court of Appeals for the Seventh Circuit in this case.

This Court heard the *Bisso* case in 1955 for the purpose of resolving conflicts between the several circuits with respect to towage liability limitation clauses. The decision in *Bisso* clearly enunciated a public policy striking down any form of limitation clause in a towage contract. Such a rule of public policy neces arily repudiated and overruled the decision of the Sixth Circuit made 33 years earlier in the *Canada Steamship* case.

QUESTION II

The decision of the Court of Appeals in this case is in complete accord with the decisions of this Court.

This Court is familiar with the protracted efforts of the towing industry to avoid the consequences of tug negligence by contract of towage. A broad public policy was set forth by this court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85, 99 L. Ed. 911, 75 S. Ct. 629 (1955) prohibiting a tugboat from contracting out of the consequences of its own negligence. Adjusting its cap to fit the circumstances, Petitioner, The Great Lakes Towing Company, brought forth a new tariff in 1956 arbitrarily placing a limit upon its liability for negligent towage of $1.000.00, offering in return a rate escalation option for increased liability. Upon adequate evidence, the Courts below have found that the token amount of $1,000.00 bore no reasonable relationship to damages ordinarily resulting from tug—steamboat disasters and that the escalation option was never used in Lake custom and practice. The limitation is, and was viewed by the Courts below as tantamount to exculpation.

Examination of Respondent's tariff (Exhibit 11c, set forth in the Appendix Pgs. 428-434) reveals a comprehensive scheme to avoid the consequences of tug negligence not only in situations covered by the tariff provisions here under scrutiny, but also in virtually every other type of tug operation except the most simple movements of a vessel under tow. Quite obviously, then, the 1956 revision of Article 16 was an effort to avoid the public policy mandated by this Court in *Bisso*.

The public policy defined by this Court in *Bisso v. Inland Waterways Corp.*, 349 U. S. 85, 99 L. Ed. 911, 75 S. Ct. 629

(1955) and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U. S. 697, 10 L. Ed. 2d 78, 83 S. Ct. 967 (1963) is predicated upon three pre-eminent factors, to wit: the discouragement of negligence on the part of the tower; protection of the tow from overreaching conduct on the part of the tower; and certainty of commercial transactions.

Enforcement of Article 16 can in no way discourage tug negligence. Fundamentally, the tug is liable only for its own negligence. If no increased rate is paid, there is absolutely no incentive for the towing company to exercise due care. If the steamboat company pays an increased rate under the options available to it, Petitioner is still only responsible for its own negligence (but only to the extent the rate increase has increased the limitation schedule of the tariff). No matter how much the rate is increased under the option afforded under Article 16, the Petitioner accepts no greater responsibility. It does not become an insurer, it does not become a bailee, it does not even accept the high degree of responsibility exacted of a common carrier.

At least since 1914 Petitioner has had a virtual monopoly on harbor towing in all major ports of the Great Lakes. *United States v. Great Lakes Towing Co. et al.*, DCND Ohio, 208 Fed. 733; Findings of Fact #8 and #9, A. 415. While it is obliged to serve all customers by the continuing injunction issued by the Federal Court in Cleveland in 1914, the absence of competition and the fact that Petitioner's tariff is subject to no review by any regulative body puts its customers completely at Petitioner's mercy.

In the case at bar, there was a large, unwieldy steamship in need of assistance in confined water. There were

no arms length negotiations leading to the towage contract as there were in *Dixilyn*, and Respondent had no choice of tug service. The plain fact of the matter is that Petitioner dictated the terms of the towage contract some two years prior to the accident of May 23, 1961 on a "take it" or "leave it" basis (See Exhibits 11c, 12c, 12b and 12a set forth at Pgs. 428-436 of the Appendix). This we submit is a classic example of overreaching on the part of the Petitioner.

The options afforded by Petitioner's tariff forced upon Respondent two impossible decisions. First of all the Respondent vessel owner had to determine in advance when an accident would happen and second, the amount of damage and delay that would be sustained in the accident.

There was considerable proof in the District Court showing the great variations with respect to damages in this type of accident demonstrating the futility of attempting to guess in advance the amount of increased "limitation" which should have been purchased from Petitioner. As the Court of Appeals noted in this case:

> "* * * there is no commercial 'certainty' as the escalation provision has little meaning where the owner cannot anticipate the measure of damages to its vessel, and make a judgment about higher valuations and rates accordingly." (333 F. 2d at 430.)

In *Southwestern Sugar & Molasses Co. v. River Terminals Corporation*, 360 U. S. 411, 3 L. Ed. 2d 1334, 79 S. Ct. 1210 (1959) this Court did not get to the question of legality of the exculpatory clause, but rather indicated that the matter should be first passed upon by the I. C. C. in an appropriate form of proceeding (Pg. 421 of 360 U. S.). In this case Petitioner's tariff is subject to no administrative review, but is unilaterally conceived and imposed by

Petitioner. We submit, therefore, that Petitioner's reliance on *Southwestern Sugar* is misconceived.

QUESTION III

Petitioner cites no authority to support its contention that a non-regulated monopoly such as the Great Lakes Towing Company is entitled to any special consideration with respect to the basic rules of liability.

The status of the Petitioner is unique. It has been determined to be a monopoly and continues in business at the pleasure of the Courts. *United States v. Great Lakes Towing Company*, DCND Ohio, 208 Fed. 733 (1913); DCND Ohio 217 Fed. 656 (1914). There was no other tug service available to Respondent's steamer DETROIT EDISON (Finding of Fact #8, A. 415). Petitioner, therefore, commanded the market as completely as any common carrier could have. Yet the scope of regulatory protection afforded to shippers under the Interstate Commerce Act, The Federal Communications Act or the Civil Aeronautics Act is entirely foreign to the Great Lakes shipping industry where vessel operators are left at Petitioner's mercy without recourse against the unilaterally conceived terms and conditions of Petitioner's tariff. Nor may Petitioner's business of harbor towing be equated to the business of carrying goods for hire. Under the settled law of towage, Petitioner never becomes a bailee of the tow and its obligations to the tow arise from the law of torts rather than the law of contracts. *Stevens v. The White City*, 285 U. S. 195, 76 L. Ed. 699, 52 S. Ct. 347 (1932); *The Brooklyn*, 2 Ben. 547, Fed. Case No. 1938 (1868); *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382, 12 Wall. 167 (1871); *American Bridge Division U. S. Steel Corp. v. Roen Steam-*

ship Company, DC Wisc. 1963, 216 F. Supp. 353, Aff'd. 7th Cir. 1964, 328 F. 2d 838; *Mississippi Valley Barge Line Co. v. Inland Waterways Shippers Association, Inc.,* 8th Cir. 1961, 289 F. 2d 374, cert. den. 368 U. S. 876, 7 L. Ed. 2d 77, 82 S. Ct. 123; *Mississippi Valley Barge Line Co. v. T. L. James & Co.,* DC La. 1956, 144 F. Supp. 662, Aff'd. 5th Cir. 1957, 244 F. 2d 263, cert. den. 355 U. S. 871, 2 L. Ed. 2d 76, 78 S. Ct. 121; *Continental Grain Co. v. American Commercial Barge Line Co.,* 7th Cir. 1964, 332 F. 2d 26.

The attempt to confuse the applicable law governing carrier rate structure with the basic laws of towage is not original with this Petitioner. A similar campaign was pursued by the tug owner in *Mississippi Valley Barge Line Company v. T. L. James & Co.,* DC La. 1956, 144 F. Supp. 662. In the *James* case, the barge line company as owner of a towboat had issued a bill of lading to James as charterer of a barge to cover the transportation of heavy equipment in a tow on the Mississippi River. The barge sank as a result of negligent towage. The barge line company defended on the grounds that it was a certificated carrier and that its tariff, filed with I. C. C., exonerated it from liability for negligence. Judge Wright perceptively observed (144 F. Supp. 663):

> "This litigation presents a valiant but unsuccessful attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability for negligence clauses in towage contracts. * * *"

Judge Wright then went on to discuss the problem at hand saying at Pages 666-667:

> "The history of the fight of the common carrier to relieve itself of the stringent liability imposed by the common law is well known. The history of the fight to exempt towage from common carrier liability is likewise well known. Unsuccessful in their attempt to obtain judicial approval for release from liabil-

ity clauses in their carriage contracts, the carriers persuaded the Congress to pass the Harter Act in 1893. With reference to towage contracts, the Supreme Court in 1955, having previously exempted the tower from carrier liability, after backing and filling for many years, finally and definitively held that release from liability for negligence clauses in towage contracts are illegal as against public policy. Bisso v. Inland Waterway Corp., *supra*. Adjusting its cap to fit the change in circumstances, Mississippi Valley maintains that the contract of towage in suit is a contract of common carriage after all, and that as such it is entitled to the protection of Section 3 of the Harter Act as well as the release from liability provisions of its tariff filed with the Commission pursuant to the Interstate Commerce Act.

The carrier's contention is in the teeth of the opinion of the Supreme Court in Cornell Steamboat Co. v. United States, 321 U. S. 634, 64 S. Ct. 768, 88 L. Ed. 978. * * * A study of the Cornell Steamboat litigation through the Commission, the district court, and the Supreme Court leaves no doubt that while a carrier engaged in towage may be required to be certificated under the Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with reference to towage."

In affirming, Judge Hutchinson, speaking for the Fifth Circuit (1957, 244 F. 2d 263) said at Page 267:

"* * * we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took. * * * (the facts) not only tends strongly we think to support but also to compel the view that the parties were contracting not for afreightment but for a towage service and that the district judge was right in so holding."

This Court denied a petition for certiorari, 355 U. S. 871, 2 L. Ed. 2d 76, 78 S. Ct. 121.

The fundamental distinction between Petitioner's authorities pertaining to transportation services subject to regula-

tion and its own peculiar status was alluded to by this Court in *Southwestern Sugar* at Pages 416-417 of 360 U. S. where Mr. Justice Harlan said:

> "We think * * * the true question here presented, which *is whether considerations of public policy* which may be called upon by courts to strike down private contractual arrangements between tug and tow *are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body.* In Bisso the clause struck down was part of a contract over the terms of which the I. C. C., the body primarily charged by Congress with the regulation of the terms and conditions upon which water carriers subject to its jurisdiction shall offer their services, had no control * * *
>
> In these circumstances we would be moving too fast were we automatically to extend the rule of Bisso to govern the present case. For all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the towboat owner of the expense of insuring itself against liability for damage * * * and is a reasonable rate so computed. If that were so, it might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance with knowledge that the towboat may be required to respond in damages * * * despite agreement to the contrary. *For so long as the towboat's rates are at all times subject to regulatory control, * * * the possibility of an overreaching whereby the towboat is at once able to exact high rates and deny the liabilities which transportation at such rates might be found fairly to impose upon it can be aborted by the action of the I. C. C.* The rule of Bisso, however applicable where the towboat owner has 'the power to drive hard bargains', may well call for modification when that power is effectively controlled by a pervasive regulatory scheme." (Emphasis Ours.)

QUESTION IV

The issue of liability was essentially a question of fact which was determined adversely to petitioner in the District Court and affirmed by the Court of Appeals. No new authority or proposition of law has been cited by petitioner.

Petitioner apparently no longer challenges the findings of fault against its tug Montana. With respect to the Detroit Edison, the District Court both found and concluded:

> "That the Steamer Detroit Edison fulfilled all of its obligations in the joint venture and at all times material exercised reasonable care and maritime skill which prudent navigators employ in the same or similar circumstances." (Finding of Fact #34, Conclusion of Law #4, A. 392-393.)

The Court of Appeals duly noted:

> "* * * We have considered the entire evidence and are not left with a definite and firm conviction that a mistake has been made. * * *" (333 F. 2d at 428.)

The law of negligent towage is well settled. In the absence of new authorities the issue of contributory fault on the part of the DETROIT EDISON at best only raised questions of fact which were properly determined by the Trial Court. *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6, (1954).

Petitioner's arguments seeking to equate the alleged failure of the bow lookout of the DETROIT EDISON with statutory fault and complaint of failure to relay information from the stern lookout were thoroughly briefed in the Court of Appeals both on the cross appeal and petition for rehearing. It is, of course, axiomatic that even if there was a failure of lookout in any respect, there was still a ques-

tion of fact for the Trial Court to determine whether such failure was causally related to the disaster. *Hess Tankship Company v. S. S. M. L. Gosney*, DC Vir. 1963, 230 F. Supp. 1. Actually, the evidence established beyond peradventure of doubt that Petitioner's Tug Montana had the dock to which she was convoying the DETROIT EDISON in plain view at all times and there was absolutely nothing important that the DETROIT EDISON could have told her which she should not already have known. See *Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch & Co., Ltd.*, 4 Cir. 1963, 301 F. 2d 59; *Continental Oil Company v. M. S. Glenville*, DC Tex. 1962, 210 F. Supp. 865. Furthermore, Respondent relies on many of the same authorities in both the Courts below that Petitioner now advances as reasons for granting further review.

We submit that the conclusions of the District Court and the opinion of the Court of Appeals are in complete accord with all of the authorities relied upon by Petitioner. Only the facts vary and Petitioner has twice failed in its burden of establishing facts which would condemn the DETROIT EDISON in this disaster.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted.

FENTON F. HARRISON,
COFFEY, HEFFERNAN & HARRISON,
1317 Chamber of Commerce Bldg.,
Buffalo 2, New York,
Proctors for American Steamship Company, Respondent.

Office-Supreme Court, U.S.
FILED
SEP 25 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 373

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF.

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Table of Cases Cited i

Argument 1

I. Bisso v. Inland Waterways Corp., 349 U. S. 85 (1955), and subsequent decisions of this Court pertinent thereto apply only to exemption from liability clauses in towage contracts and not to limitation clauses or the charging of alternative rates based upon the risk assumed 1

II. The decision of the Court of Appeals in this case clearly extends decisions of this Court beyond their intended and stated application. 3

III. Petitioner seeks only to have equal consideration with respect to the basic rules of liability. 8

IV. As to the issues of liability, the Steamer Detroit Edison had an absolute duty as to lookout for the benefit of both vessels and failed to fulfill that duty 10

Conclusion 12

Table of Cases Cited.

American Steamship Co. v. Great Lakes Towing Co., N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156 6

Bisso v. Inland Waterways Corp., 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955) 2

Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2) 78 (1963) 2

George N. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915) 7

Great Lakes Towing Co. v. Bethlehem Transp. Corp., 6th Cir. 1933, 65 F. (2d) 543 ..... 2, 6

Hand & Johnson Tug Boat Line v. Canada S. S. Lines, Ltd., 6th Cir. 1922, 281 Fed. 779 1

Mississippi Valley Barge Line Company v. T. L. James & Co., D. C. La. 1956, 144 F. Supp. 662, affirmed, 5th Cir. 1957, 244 F. (2d) 263, cert. den., 355 U. S. 871, 78 S. Ct. 121, 2 L. Ed. (2d) 76 9

Petition of Isbrandtsen Company, 2nd Cir. 1953, 201 F. (2d) 281 7

Stevens v. The White City, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699 (1931) 6

Sturgis v. Boyer, 65 U. S. (24 How.) 110, 16 L. Ed. 591 (1861) 6

The Maria Martin, 79 U. S. (12 Wall.) 31, 20 L. Ed. 251 (1871) 6

The Pennsylvania v. Troop, 86 U. S. (19 Wall.) 125, 22 L. Ed. 148 (1874) 12

The W. G. Mason, 2nd Cir. 1905, 142 Fed. 913 6

United States v. Great Lakes Towing Co., N. D. Ohio 1914, 217 Fed. 656 4

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921) ... 4, 7

Weyerhaeuser Steamship Co. v. United States, N. D. Cal. 1951, 174 F. Supp. 663 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 373.

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF.

ARGUMENT.

I.

BISSO v. INLAND WATERWAYS CORP., 349 U. S. 85 (1955), AND SUBSEQUENT DECISIONS OF THIS COURT PERTINENT THERETO APPLY ONLY TO EXEMPTION FROM LIABILITY CLAUSES IN TOWAGE CONTRACTS AND NOT TO LIMITATION CLAUSES OR THE CHARGING OF ALTERNATIVE RATES BASED UPON THE RISK ASSUMED.

In its answering brief respondent states that the Sixth Circuit actually considered the legality of the demurrage clause in petitioner's tariff in 1922 in *Hand & Johnson*

Tug Line v. *Canada S. S. Lines, Ltd.*, 6th Cir. 1922, 281 Fed. 779, and that eleven years later in *Great Lakes Towing Co.* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543, the court merely determined whether certain claims "came within the purview of demurrage rather than special damages." This is not true. In considering the demurrage clause of petitioner's tariff in the 1933 decision, the court clearly reaffirmed its earlier decision stating the following at the close thereof:

> "The reasonableness of the limitation and the power to impose it were approved in that case and by this court in *Hand & Johnson Tug Line* v. *Canada S. S. Lines, Ltd.* (C. C. A.), 281 F. 779. Compare, also, *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656; *Queen of the Pacific, supra.* With the reasoning of these decisions we fully agree."

In its answering brief respondent baldly states that this Court undertook to hear *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 75 S. Ct. 629, 99 L. Ed. 911 (1955), "for the purpose of resolving conflicts between the several circuits with respect to towage liability limitation clauses" and that the *Bisso* case "clearly enunciated a public policy striking down any form of limitation clause in a towage contract." This also is not true. The decision of this Court in the *Bisso* case and that more recently in *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. (2d) 78 (1963), specifically and explicitly referred to release from *all* liability or exculpatory clauses. By no stretch of the imagination can the decisions of this Court in either of those cases be said to have directly or indirectly invalidated limitation of liability provisions in towage contracts. Even the United States Court of Appeals for the Seventh Circuit in the decision below in this case recognized this and stated that it was extending the reasoning of those two cases to the

instant case "even though the tariff provisions before us limit, rather than exclude, liability." There is clearly a direct conflict between the two prior decisions of the Sixth Circuit and the decision of the Seventh Circuit in this case as to the validity of the demurrage clause in petitioner's tariff.

II.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE CLEARLY EXTENDS DECISIONS OF THIS COURT BEYOND THEIR INTENDED AND STATED APPLICATION.

Respondent in its answering brief states that the stern first and winding (turning) clause in petitioner's tariff (Article 16) "was viewed by the Courts below as tantamount to exculpation." This is incorrect. The District Court upheld the validity of the clause expressly on the basis that it was a *limitation* clause and not one which purported to "excuse the tug from all liability." One need only to refer again to that portion of the decision of the Seventh Circuit quoted above to see that the Seventh Circuit viewed "the tariff provisions before" it as ones which "limit rather than exclude, liability."

Respondent argues that because petitioner has a virtual monopoly as to harbor towing in all the major ports of the Great Lakes, even though it is obliged to serve all customers who request service pursuant to the continuing injunction under which it is permitted to operate, the fact that its tariff is not subject to review by a regulative body places petitioner's customers at its mercy. Again, such is incorrect and untrue. The continuing injunction, set forth in full in the appendix of the petition (pp. 36-41), establishes a very substantial and rigid framework within which petitioner must operate to continue in business. In no uncertain terms it contains restrictions as to rate cut-

ting in the face of competition which force petitioner to charge no more than reasonable rates for its services. The court rendering the injunction retained jurisdiction of the cause and the injunction specifically provides for review at any time that either The Great Lakes Towing Company or the *United States of America* applies therefor. The injunction contains provisions specifically made similar to the original Interstate Commerce Act. *United States* v. *Great Lakes Towing Co.*, N. D. Ohio 1914, 217 Fed. 656. In this respect, the facts in the instant case are almost identical to those considered by this Court in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921), except that in the instant case a towing company is being considered and in the *Western Union* case the Western Union Telegraph Company was being considered. This Court had no difficulty in the *Western Union* case in upholding the validity of charging alternative rates for the sending of messages based upon the risk assumed by the telegraph company, and in that instance there was not even provision for unlimited liability but only two degrees of limited liability based upon the alternative rates paid therefor.

Respondent argues for, and the Seventh Circuit evidently adopted, a theory that "commercial certainty" is lacking because the escalation provision in the stern first and winding (turning) clause of petitioner's tariff has little meaning where the vessel owner cannot anticipate the measure of damages to its vessel so as to be able to make a judgment about higher valuations and rates. In making this argument both respondent and the Court of Appeals fail to take into consideration that which is so patent as to be self-evident and which was one of the primary bases for the decision of the District Court. The stern first and winding (turning) clause is only effective so long as the vessel owner elects to use but one tug in that particular

operation. The vessel owner has three very distinct choices: to use one tug at the base rate with limited liability on the part of the tug; to use one tug at an increased rate somewhere between the base rate and double the base rate with a correspondingly increased liability on the part of the tug; to use two tugs without any limitation as to their liability. In no instance does the vessel owner have to pay more than double the base rate for the use of two tugs, in which case the limitation provision becomes inapplicable. Can anything bring more absolute certainty to a situation where *both* the vessel owner and the tug owner "cannot anticipate the measure of damages" to the vessel?

Respondent argues that the terms of petitioner's tariff are dictated to and imposed upon it, but there is no proof thereof in the record. As a matter of fact, the record is clear that on one of two previous trips in 1961 the Steamer Detroit Edison made a similar movement using two tugs and that on a subsequent trip during the same season of navigation the Detroit Edison made a stern first movement from the Inland #2 dock to the Inland #4 dock without the assistance of any tugs. There is nothing in the record to indicate that the use of a tug or tugs by the Steamer Detroit Edison for the movement in question on May 23, 1961 was necessary. The only evidence in the record is that such was desired by the master of the steamer. In the absence of such evidence, it is difficult to say that petitioner imposed any terms upon or dictated any terms to respondent. It is clear that the choice was solely that of respondent. It had the election of using no tugs, of using one tug and paying the base rate therefor with limited liability, of using one tug and paying an increased rate therefor with an increased limitation in the liability, and of using two tugs with unlimited liability.

Harbor towing operations may and do vary considerably

from a tug or tugs with a dead, unmanned tow, such as a barge or flotilla of barges or a grain boat being used for storage purposes, all the way up to a tug, or more than one tug, with a live, fully manned tow operating her own engines and helm. *Stevens* v. *The White City*, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699 (1931). The responsibilities have been held to vary as between tug or tugs and live, fully manned, tow dependent upon the number of tugs assisting the vessel in tow and their assisting positions. Where two tugs assist a vessel, one at the bow and one at the stern; or where the tug is in sole charge of the navigation, it is sometimes said that the tug (or tugs) is the "dominant mind" of the venture. *Sturgis* v. *Boyer*, 65 U. S. (24 How.) 110, 16 L. Ed. 591 (1861); *The W. G. Mason*, 2nd Cir. 1905, 142 Fed. 913. Where one tug is assisting a fully manned vessel with its own motive power and steering apparatus operating or available for use, it is well settled that the tug and vessel together are engaged in a joint and cooperative effort. *The Maria Martin*, 79 U. S. (12 Wall.) 31, 20 L. Ed. 251 (1871); *Great Lakes Towing Co.* v. *Bethlehem Transp. Corp.*, 6th Cir. 1933, 65 F. (2d) 543; *American Steamship Co.* v. *Great Lakes Towing Co.*, N. D. Ohio 1947, 73 F. Supp. 359, affirmed, 6th Cir. 1948, 165 F. (2d) 368, cert. den., 333 U. S. 881, 68 S. Ct. 913, 92 L. Ed. 1156. Such was the situation in the instant case and both lower courts agreed thereon. Each vessel was dependent upon the other to successfully fulfill certain duties and obligations. In addition, the instant case concerned a stern first, turning maneuver. The stern first and winding (turning) clause really does no more than establish alternative rates for that particular class and type of service based upon the risk to be assumed by petitioner. The fact that the amount of the limitation is disproportionate to the amount of the claim for damage is of no consequence in determining the validity of the

provision. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921); *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576 (1915); *Petition of Isbrandtsen Company*, 2nd Cir. 1953, 201 F. (2d) 281. The facts that there are alternative rates, that they are based upon the risk assumed, that there is provision for unlimited liability and that the rates are fixed within a legal framework specifically applicable thereto (such as the continuing injunction pursuant to which petitioner is required to operate, or the old Interstate Commerce Act) make the rates and the limitation provisions applicable thereto valid and raise the presumption that they are reasonable. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094 (1921). Not one shred of proof was offered in the instant case to show that the rates and limitations contained in the petitioner's tariff were unreasonable and the District Court found them to be reasonable. No proof as to the economics of the operations of either petitioner or respondent was offered whereby a finding of unreasonableness could be justified.

The decision of the Seventh Circuit in this case clearly and admittedly extends the decisions of this Court in *Bisso* and *Dixilyn* from release from *all* liability clauses to limitation of liability clauses or clauses purporting to charge alternative rates for services to be performed based upon the risk assumed. In so doing the Seventh Circuit went beyond the bounds prescribed by this Court.

III.

PETITIONER SEEKS ONLY TO HAVE EQUAL CONSIDERATION WITH RESPECT TO THE BASIC RULES OF LIABILITY.

Respondent argues that petitioner has cited no authority to support its contention that it is entitled to special consideration with respect to the basic rules of liability. Such an argument twists the position of petitioner completely. Petitioner is seeking only to have itself treated in accordance with the basic rules of liability.

Under respondent's so-called basic rules of liability, parties which contract at arm's length and from equal bargaining positions not only have the right to limit liability by contract but have the right to release themselves by contract from *all* liability for negligence. It is only when the bargaining position between the parties becomes unequal that courts have held that the party bargaining from a superior position cannot release itself from all liability. This has been the case with common carriers, employers, bailees and public service companies. However, the very fact that such have been prohibited from contracting to release themselves from all liability has been acknowledged to place them at the lesser end of an unequal bargaining position. Therefore, they have been specifically permitted to contract for *limited* liability through the use of alternative rates based upon the risk assumed. The decision below of the Seventh Circuit denies petitioner even that right.

In *Bisso* and *Dixilyn* this Court removed towers from the category of ordinary business entities because of the nature of the business and specifically equated them with bailees, employers and public service companies. In doing so this court held that towers could no longer release themselves from *all* liability by contract but made no mention whatso

ever of limitation of liability provisions in contracts or the charging of alternative rates based upon the risk assumed. *Mississippi Valley Barge Line Company* v. *T. L. James & Co.*, D. C. La. 1956, 144 F. Supp. 662, affirmed, 5th Cir. 1957, 244 F. (2d) 263, cert. den., 355 U. S. 871, 78 S. Ct. 121, 2 L. Ed. (2d) 76, so freely quoted and heavily relied upon in respondent's answering brief, like *Bisso* and *Dixilyn* treated only with a release from *all* liability or *exoneration* clause and not a *limitation* clause. The Seventh Circuit in the decision below removed petitioner from equality with bailees, employers and public service companies by stating that it not only could not release itself from all liability by contract but that it could not contractually limit its liability in the limited situation of a stern first or winding (turning) maneuver by charging alternative rates based upon the risk assumed with provision for unlimited liability upon payment of double the base rate with the use of two tugs. This places petitioner in a unique and extremely difficult position. Under the terms of the injunction pursuant to which it is permitted to operate, petitioner must serve all who request service in accordance with the requests. If a vessel owner requests the assistance of one tug, petitioner must furnish it. If the vessel owner requests the assistance of two tugs, petitioner must furnish it. Petitioner has no right to refuse the service requested except where there is question as to the financial responsibility of the vessel owner requesting the service. Petitioner must fix and publish its rates within a rigid framework laid down by the injunction. Under the decisions in *Bisso* and *Dixilyn*, petitioner cannot release itself by contract from *all* liability for the negligence of its tugs. Under the decision of the Seventh Circuit below, petitioner cannot contractually limit its liability for negligence, even as to limited classes of service, and, in effect, cannot charge alternative rates for the service requested based upon the

risk assumed. Petitioner is at the lesser end of not only an unequal bargaining position, but also one which is wholly untenable.

IV.

AS TO THE ISSUES OF LIABILITY, THE STEAMER DETROIT EDISON HAD AN ABSOLUTE DUTY AS TO LOOKOUT FOR THE BENEFIT OF BOTH VESSELS AND FAILED TO FULFILL THAT DUTY.

Respondent argues in its answering brief that petitioner's tug had visibility down one side of the Steamer Detroit Edison at all times and could see the Inland #4 dock which the vessels were approaching. This is true. However, visibility down one side of the steamer from a position over 600 feet away from the steamer's stern as it approached the Inland #4 dock, with absolutely no visibility astern of the steamer and no visibility to the other side of the steamer, certainly cannot be said to give those aboard the tug a clear and unobstructed view of the approach to the dock. Such would make a mockery of the requirement that a vessel keep a lookout at all times and that the lookout be posted as far forward as is possible. *Weyerhaeuser Steamship Co.* v. *United States*, N. D. Cal. 1951, 174 F. Supp. 663. Had the Tug Montana been charged with the duty of maintaining a lookout astern of the Steamer Detroit Edison for both vessels, the tug would undoubtedly have been held negligent for not having a man on the stern of the steamer. It would have been insufficient for the tug at her position at the steamer's bow to maintain a lookout astern of the steamer. As set forth in the petition, under the law it was the duty of the steamer to maintain a lookout at her stern for the benefit of both vessels. Such a lookout was physically maintained. The steamer's first mate on duty at her stern called back the various distances to the steamer's pilot house and gave warning that he felt

the speed astern to be excessive. None of those messages from the steamer's stern to her pilot house were relayed to the tug. The tug was held negligent for moving the steamer too fast astern, for selecting and initiating an unsafe course for the steamer and for permitting the stern of the steamer to come too close to the dock before attempting to swing the steamer for a landing. No one was in a better position to be apprised of these failures on the part of the tug then the lookout on the steamer's stern and the steamer's master up high in the pilot house. When the steamer's stern was 600 feet away from the dock, her master felt some danger. When her stern was 400 feet away from the dock, the mate on her stern started calling out distances and warnings to her pilot house. The one and only communication from the steamer to the tug was not given until her stern was less than 300 feet away from the dock. Respondent seeks to escape the responsibility for lookout and all that it entailed by stating that those aboard the tug could see the dock at all times as the steamer was approaching it. This is only a half-truth. They could see only a portion of the dock and that was not the portion where the steamer was to dock. It is self-evident that, from their position over 600 feet away from the steamer's stern and looking down only one side of the steamer, they could not tell what was directly astern of the steamer or to the other side. It is uncontroverted that those aboard the tug were relying upon the steamer for information as to her course and speed and the position of her stern with reference to the dock. It is uncontroverted that those aboard the steamer knew this. It is uncontroverted that those aboard the tug did not even know that a collision had occurred until afterward. With these facts in mind, how can it be said that the failure of lookout on the part of the steamer, by her lack of communication with the tug, could help but have caused or contributed to the cause of the

accident? Under the rule of *The Pennsylvania* v. *Troop*, 86 U. S. (19 Wall) 125, 22 L. Ed. 148 (1874), the failure of lookout placed the burden upon respondent to prove that it not only might not have been one of the causes, or that it probably was not one of the causes, but that it *could not* have been one of the causes of the resultant collision. Both the decision of the District Court and that of the Seventh Circuit were silent on the subject. Neither even mentioned the facts concerning the steamer's stern lookout and the lack of communication to the tug, much less the law applicable thereto. The breach of duty on the part of the steamer was clearly a cause, if not the cause, of he collision of the steamer's stern with the Inland #4 dock.

CONCLUSION.

For the reasons set forth above as well as those set forth in the petition herein, it is respectfully submitted that the petition for writ of certiorari should be granted and that this Court should determine the issues between the parties upon the merits.

Respectfully submitted,

WALTER S. DAVIS,
HARNEY B. STOVER, JR.,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin,
Proctors for The Great Lakes Towing Company, Petitioner.

Of Counsel:
HARNEY B. STOVER,
324 East Wisconsin Avenue,
Milwaukee, Wisconsin.